165-363

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 182.

THOMAS F. OAKES, HENRY C. PAYNE, AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CLARA MASE, ADMINISTRATRIX OF THE ESTATE OF FRANK B. MASE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED OCTOBER 17, 1894.

(15,709.)

in good faith should be thus hampered is evidenced by the amendment of July 17, 1854 (10 Stat., 305), to the act in question, by which the restrictions upon alienation prior to patent, contained in the fourth section of the original act are repealed.

With these considerations it does not appear that there is anything to be found in the Records to indicate that the decree in the court below was not in strict conformity with the well-settled law of this case.

CHAS. A. MAXWELL,
GEO. S. CHASE,
Attorneys for Appellee.

James H. Reid
of Counsel

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1894, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the seventh day of May, A. D. 1894, before the Honorable Henry C. Caldwell and Honorable Walter H. Sanborn, circuit judges, and Honorable Amos M. Thayer, district judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fourth day of December, A. D. 1893, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of The Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, administratrix of estate of Frank B. Mase, defendant in error, which said transcript of record is in the words and figures following, to wit:

1 United States of America to Clara Mase, administratrix of estate of Frank B. Mase, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the United States circuit court, district of Minnesota, third division, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, United States circuit judge of eighth circuit, this 7th day of October, A. D. 1893.

WALTER H. SANBORN,
Judge of Circuit Court.

Ent. 908 E. law. United States circuit court of appeals, eighth circuit. Northern Pacific R. R. Co., plaintiff in error, *vs.* Clara B. Mase, adm'x. Citation. Due service of within admitted this 10th day of October, A. D. 1893. W. W. Irwin & W. A. Shumaker, att'ys for def't in error. J. H. Mitchell, Jr., and Tilden R. Selmes, att'ys for plaintiff in error. Filed Oct. 12, 1893. Oscar B. Hillis, clerk.

United States Circuit Court, District of Minnesota, Third Division.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the honorable judges of the United States circuit — of appeals of the eighth circuit:

Your petitioner, The Northern Pacific Railroad Company, the plaintiff in error in the above-entitled action, respectfully shows that by the judgment heretofore rendered by said United
2 States circuit court, for the district of Minnesota, third division in the above-entitled action, a manifest error hath happened to the great damage of your petitioner in this: That a great and manifest error of law occurred at the trial of said cause against the objection of your petitioner and to its great damage, all of which will more fully appear by the error of said court in said case.

Wherefore, your petitioner prays your honors to allow a writ of error from the United States circuit court of appeals for the eighth circuit, to be directed to said United States circuit court for the district of Minnesota, third division, whereby under seal of said United States circuit court for the district of Minnesota, third division, the record and proceedings aforesaid, with all things concerning the same may be transmitted to the United States circuit court of appeals, eighth circuit, with said writ of error, and that the record and proceedings aforesaid, being duly inspected, the said United States circuit court of appeals, eighth circuit, will cause further to be done therein and correct that error, what of right and according to the laws and custom of the United States, should be done.

JOHN H. MITCHELL, JR., &
TILDEN R. SELMES,
Attorneys for Petitioner.

Indorsed: Petition for writ of error. Filed October 7th, 1893. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States, district of Minnesota, third division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the June term, 1893, thereof, between Clara Mase, administratrix of the estate of Frank B. Mase, dec'd, and The Northern Pacific Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of ap-
3 peals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the seventh day of December, 1893, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this seventh day of October, in the year of our Lord one thousand eight hundred and ninety-three.

The Seal of the U. S. Circuit Court, Dist. of Minnesota, Third Division.

Issued at office in St. Paul, with the seal of the U. S. circuit court for district of Minnesota and dated as aforesaid.

OSCAR B. HILLIS,
Clerk of said Court.

Allowed by—
WALTER H. SANBORN,
Circuit Judge.

Ent. 908 E. law. United States circuit court of appeals, eighth circuit. Northern Pacific R. R. Co., plaintiff in error, *vs.* Clare Mase, adm'x. Writ of error. J. H. Mitchell, Jr., and Tilden R. Selmes, att'ys for plaintiffs in error. Filed Oct. 7th, 1893. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, } ss:
District of Minnesota, Third Division, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the circuit court of the United States for the district of Minnesota, third division.

The Seal of the U. S. Circuit Court, District of Minnesota, Third Division.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for District of Minnesota.

4 Know all men by these presents that we, The Northern Pacific Railroad Company, by Tilden R. Selmes its attorney as principal, and A. S. Morton and M. P. Martin of St. Paul, Ramsey county, Minnesota, as sureties, are held and firmly bound unto Clara Mase, administratrix of the estate of Frank B. Mase, dec'd, in the full and just sum of five hundred dollars to be paid to the said

Clara Mase, adm'r of estate of Frank B. Mase, dec'd, heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 7th day of October in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at the June, 1893, term of the U. S. circuit court, district of Minnesota, third division in a suit depending in said court between Clara Mase, adm'r of estate of Frank B. Mase, dec'd, plaintiff, and The Northern Pacific Railroad Company, defendant, judgment was rendered against the said defendant and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Clara Mase, adm'r of estate of Frank B. Mase, dec'd, citing and admonishing her to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect, and answer all costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By TILDEN R. SELMES, [SEAL.]
Ass't Counsel.
A. S. MORTON. [SEAL.]
M. P. MARTIN. [SEAL.]

In presence of—
JOHN G. DRESSEN.
A. R. TAYLOR.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 7th day of October, A. D. 1893, personally came be-
5 fore the undersigned, A. S. Morton and M. P. Martin, the same persons who signed and sealed the foregoing instrument and each having been first duly sworn, did depose and say, that he is a resident and freeholder of this State, and worth the sum of five hundred dollars above debts, liabilities, and property exempt from levy and sale under execution.

A. S. MORTON.
M. P. MARTIN.

[NOTARIAL SEAL.] Subscribed and sworn to before me on the 7th day of October, A. D. 1893.

JOHN G. DRESSEN,
Notary Public, Ramsey County, Minnesota.

Indorsed: Cost bond. Filed Oct. 7th, 1893. Oscar B. Hillis, clerk. Approved Oct. 7th, 1893. Walter H. Sanborn, circuit judge.

Assignments of Error.

United States Circuit Court, District of Minnesota, Third Division.

CLARA MASE, as Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Now comes the above-named defendant, by John H. Mitchell, Jr., and Tilden R. Selmes, its attorneys, and says that in the record of proceedings in said court on the above-entitled action, and also in giving judgment in said action there is manifest error in this:

That the court erred in ordering that judgment be entered for the plaintiff upon the facts as stipulated in said action in that:

(*a*) The negligence as shown by the stipulated facts which caused the injuries for which the plaintiff seeks to recover was the negligence of a fellow-servant in the same line of employment with the plaintiff, and not the negligence of the defendant, or a servant or a- employé of the defendant or a servant or employé for whose negligence it would be responsible to the plaintiff.

And the said defendant prays that judgment aforesaid rendered against it in this action for the errors aforesaid and the other many and manifest errors in the said record and proceedings aforesaid, may be reversed, canceled and altogether held for nothing, and that it *amy* be restored in all things which it has lost by occasion of said judgment.

6

JOHN H. MITCHELL, JR., AND
TILDEN R. SELMES,
Attorneys for Defendant.

Indorsed: Assignments of error. Filed Sept. 11, 1893. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA:

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, third division, of the June term, A. D. 1893, of said court, held in the city of St. Paul, in said district, in the year of 1893.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 23rd day of November, 1891, came the plaintiff by her attorneys and filed in the clerk's office of said court her complaint in words and figures as follows, to wit:

Complaint.

U. S. Circuit Court, District of Minnesota, Third Division.

CLARA MACE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The complaint of the plaintiff, for cause of action against the defendant above named, respectfully shows:

That she is duly appointed and legally qualified administratrix of the estate of Frank B. Mace, deceased. That her appointment as such administratrix was made by the district court of the fourth judicial district, Missoula county, Montana, on the 10th day of December, 1890. That a duly certified copy of the letters of administration granted by said court has been filed in the office of the probate court, Ramsey county, Minnesota.

7 That the defendant is now and at all the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the United States of America for the purpose of operating a railway, and especially within the State of Montana, and was at all such times engaged in operating such railway by running freight and passenger cars on its tracks within the State of Montana and elsewhere.

That on the 3rd day of October, 1890, and for a long time prior thereto, Frank B. Mase, the decedent hereinbefore named, was in the employ of the said defendant corporation as an engineer, engaged in operating a locomotive hauling a passenger train over the tracks of the said defendant.

That during all the times herein named, it was and still is provided by the laws of Montana in that behalf as follows:

"That in every case the liability of the corporation to a servant or employé acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him as if such servant or employé were a passenger."

That during all the times herein named the said defendant by its rules and regulations adopted for the regulation of its said railway, provided substantially:

"That the switch must never be left open for another train or engine upon the supposition that its conductor will close it, unless such conductor assumes the charge, and that conductors must stand by such switch until relieved, or until such switch is closed." And it further provides in substance by its said rules:

"That the conductor who uses a switch is responsible for its position until another conductor personally assumes its charge." And by its said rules, adopted as aforesaid, further provides is substance:

"That the conductors of said defendant have full authority over the employés of the trains they are placed in charge of, and such

conductors are held responsible by the defendant for the safe management of their trains, and for the strict performance of their duties on the part of the men engaged with them."

Plaintiff further alleges that at said time and at or near a certain station on defendant's line, within the said State of Montana known as Butler, a certain conductor by the name of Short *who* was
8 then and there in charge of a certain train of cars and locomotive hauling the same passing over the defendant's road in advance of the train on which the said decedent was engaged and operating as aforesaid. That such conductor was then and there operating his said train under the rules set forth as aforesaid, and was charged with due care and caution in operating his said train and in handling the switch on defendant's said track.

That it became necessary for said Short in operating his said train to spring or open a certain switch at or near said station of Butler. That in violation of his duty as such conductor the said Short did carelessly and negligently fail and neglect to close or shut such switch in such manner that the said train which the said Frank B. Mase, was handling or operating as aforesaid could proceed along the track of the defendant's railway in safety. That said Short carelessly and negligently left said switch open in such a manner as to render it inevitable that the train which the said Frank B. Mase was operating as aforesaid would be derailed and thrown from the track.

That while said Frank B. Mase was proceeding as aforesaid with all due care and caution on his part, with his said locomotive and train along the said defendant's track, and in obedience to his orders received from defendant as such engineer in that behalf, the said train operated by him was run into said open switch so carelessly and negligently set and operated by the said Short, and by reason thereof the said train was derailed and thrown from the track while running with such velocity that the force thereof hurled the said Frank B. Mase to the ground, and inflicted upon him such injuries that he died within thirty minutes.

The plaintiff further alleges that the said Conductor Short was at all the times named in this complaint and for a long time prior thereto, the superior of said Frank B. Mase, with authority as such conductor to control him in the performance of his duties towards the said defendant.

The plaintiff further alleges that at the time of the derailment of said train in the manner aforesaid, and of the injuries resulting in the death of said Frank B. Mase, it was in the night-time and so dark that the said decedent could not perceive the position of said switch in time to have avoided the derailing of his said train as aforesaid, or the injuries so received by him. That the defendant had negligently and carelessly failed and neglected to provide the said switch with any lights or warnings to show the said Frank B. Mase the position thereof or to enable him in any manner to determine whether said switch was in a safe position or not in time to have avoided the said derailing of his train or the injuries so received by him which resulted in his death.

That plaintiff is the widow of said Frank B. Mase and dependent upon him for maintenance and support. That at the time of his said death the said decedent was of the age of thirty-three years, and was earning the sum of $150.00 per month. That his services as such engineer were reasonably worth said sum.

That by reason of the premises the plaintiff as the personal representative of said decedent has sustained damages in the sum of fifteen thousand dollars ($15,000).

Wherefore, plaintiff demands judgment against defendant for the sum of fifteen thousand dollars ($15,000) besides the costs and disbursements of this action.

ERWIN & WELLINGTON,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Clara Mase came before me personally and being duly sworn doth say that she is the plaintiff in the above-entitled action and acquainted with the facts that the foregoing pleading is true of her own knowledge, except as to those matters which are therein stated on her information and belief, and as to those matters that she believes it to be true.

CLARA MASE.

Subscribed and sworn to before me on this 29th day of April, A. D. 1891.

[NOTARIAL SEAL.] ALFRED S. HALL,
Notary Public, Ramsey County, Minn.

Indorsed: Complaint. Filed Nov. 23rd, 1891. Oscar B. Hillis, clerk.

And on the same day the following summons was issued and on the 24th day of Nov., 1891, said summons was returned served by the marshal, and filed of record in said cause, to wit:

UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I hereby certify and return that I served the annexed summons on the therein-named defendant, The Northern Pacific Railway Company, by handing to and leaving with Tilden R. Selmes,
10 assistant counselor for said railway company, a true and correct copy of the within summons personally at the city of St. Paul in said district on the 23rd day of November, A. D. 1891.

J. C. DONAHOWER,
U. S. Marshal,
By T. J. SHEEHAN, *Deputy.*

Service	$2 00
Mileage	12
	$2 12

(Original.)

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, } ss:

Summons.

In the Circuit Court of the United States for the District of Minnesota.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
against
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office, within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will have the amount she is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained; besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness: the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 23rd day of November, A. D. 1891. Issued at my office in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

Seal U. S. Circuit Court.

OSCAR B. HILLIS, *Clerk*,
By LOUISE B. TROTT, *Deputy*.
ERWIN & WELLINGTON,
Plaintiff's Attorneys.

11 Service of a copy hereof is hereby admitted this 23rd day of Nov., 1891.

TILDEN R. SELMES,
Ass't Counsel.

United States circuit court, district of Minnesota, third division. Ent. No. 908 E. law. Clara Mase, adm'x, plaintiff, *vs.* N. P. R. R. Co., defendant. Summons. (Original.) Filed Nov. 24th, 1891. Oscar B. Hillis, clerk. Erwin & Wellington, plaintiff's attorneys.

And afterwards on the 2nd day of December, 1891, the following amended complaint was filed of record in said cause, to wit:

Amended Complaint.

Circuit Court of the United States, District of Minnesota.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The plaintiff, for her amended complaint in the above-entitled action, alleges:

That she is the duly appointed and legally qualified administratrix of the estate of Frank B. Mase, deceased. That her appointment as such administratrix was made by the district court of the fourth judicial district, Missoula county, Montana, on the 10th day of December, 1890. That a duly certified copy of the letters of administration granted by said court has been filed in the office of the probate court, Ramsey county, Minnesota.

That the defendant is now, and at all of the times herein mentioned was, a corporation duly organized, created and existing, under and by virtue of the laws of the United States of America, for the purpose of operating a railway, and was, at all such times, engaged in operating such railway by running freight and passenger cars on its tracks within the State of Montana and elsewhere.

That on the 3rd day of October, 1890, and for a long time prior thereto, Frank B. Mase, the decedent hereinbefore named, was in the employ of the said defendant corporation as an engineer, engaged in operating a locomotive hauling a passenger train over the tracks of the said defendant.

That during all the times herein named it was, and still is, provided by the laws of Montana in that behalf, as follows:

12 "That in every case the liability of the corporation to a servant or employé acting under the orders of his superior, shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger."

That during all the times herein named it was and still is, provided by the laws of Montana in that behalf as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

That during all the times herein named it was, and still is, further provided by the laws of Montana in that behalf, as follows:

"Whenever the death of a person shall be caused by a wrongful act, neglect, or default and the act, neglect, or default would (if

death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation or company which would have been liable if death had not ensued, shall be liable for an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Every such action shall be brought by and in the name of the personal representatives of such deceased persons, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages not exceeding twenty thousand dollars, as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person; provided that every such action shall be commenced within three years after the death of such person."

That during all the times herein named, the said defendant by its rules and regulations adopted for the regulation of its said railway provided substantially:

13 "That the switch must never be left open for another train or engine upon the supposition that its conductor will close it, unless such conductor assumes the charge, and that conductors must stand by such switch until relieved or until such switch is closed," and it further provides in substance by its said rules:

"That the conductor who uses a switch is responsible for its position until another conductor personally assumes its charge," and by said rules, adopted as aforesaid, further provides, in substance:

"That the conductors of said defendant have full authority over the employés of the trains they are placed in charge of, and such conductors are held responsible by the company for the safe management of their train and for the strict performance of their duties on the part of the men engaged with them."

Plaintiff further alleges that at said time and at or near a certain station on defendant's line, within the said State of Montana, known as Butler, a certain conductor, by the name of Short, *who* was then and there in charge of a certain train of cars and locomotive hauling the same, passing over the defendant's road in advance of the train on which the said decedent was engaged and operating as aforesaid. That such conductor was then and there operating his said train under the rules set forth as aforesaid, and was charged with due care and caution in operating his said train and handling the switches on defendant's said line of track.

That it became necessary for said Short, in operating his said train, to spring or open a certain switch at or near said station of Butler. That in violation of his duty as such conductor the said Short did carelessly and negligently fail and neglect to close or shut such switch in such manner that the said train which the said Frank

B. Mase was handling or operating as aforesaid could proceed along the track of defendant's railway in safety. That said Short did carelessly and negligently leave said switch open in such manner as to render it inevitable that the train which said Frank B. Mase was operating as aforesaid would be derailed and thrown from the track.

That while said Frank B. Mase was proceeding as aforesaid, with all due care and caution on his part, with his said locomotive and train along the defendant's said track, and in obedience to his orders received from defendant as such engineer in that behalf, the said train operated by him was run into said open switch, so carelessly set and operated by the said Short, and by reason thereof the said train was derailed and thrown from the track while running
14 with such velocity that the force thereof hurled the said Frank B. Mase to the ground and inflicted upon him such injuries that he died within thirty minutes.

And plaintiff further alleges that the said conductor Short was at all of the times named in this complaint, and for a long time prior thereto, the superior of said Frank B. Mase, with authority as such conductor to control him in the performance of his duties towards the said defendant.

The plaintiff further alleges that at the time of the derailing of said train in the manner aforesaid, and of the said injuries resulting in the death of said Frank B. Mase, it was in the night-time, and so dark that the said decedent could not perceive the position of said switch in time to have avoided the derailing of his said train as aforesaid or the injuries so received by him. That the defendant had negligently and carelessly failed and neglected to provide the said switch with any lights or warnings to show the said Frank B. Mase the position thereof, or to enable him in any manner to determine whether said switch was in a safe position or not in time to have avoided the said derailing of his train or the injuries so received by him which resulted in his death.

That the plaintiff is the widow of the said Frank B. Mase and dependent upon him for support and maintenance. That at the time of his said death the said dec-dent was of the age of thirty-three years, and was earning the sum of one hundred and fifty dollars ($150.00) per month. That his services as such engineer were reasonably worth said sum.

That by reason of the premises, the plaintiff, as the personal representa-ive of said decedent, has sustained damages in the sum of twenty thousand dollars ($20,000.00). Wherefore plaintiff demands judgment against the defendant for the sum of twenty thousand dollars ($20,000,00), besides the costs and disbursements of this action.

ERWIN & WELLINGTON,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. W. Erwin, came before me personally and being duly sworn doth say that he is one of the attorneys for the plaintiff in the above-

entitled action; that the foregoing pleading is true to the best
15 of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said plaintiff is that she is absent from the county of Ramsey, in the State of Minnesota, where resides said attorney.

W. W. ERWIN.

[SEAL.] Subscribed and sworn to before me on this 2nd day of December, A. D. 1891.

R. W. JOHNSON,
Notary Public, Ramsey County, Minn.

Indorsed: Filed Dec. 2, 1891. Oscar B. Hillis, clerk.

And afterwards, on the 29th day of December, 1891, the following answer was filed of record in said cause, to wit:

Circuit Court of the United States, District of Minnesota.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Answer.

Defendant, answering the amended complaint of the plaintiff herein, admits that it is a corporation organized and existing under the laws of the United States and engaged in the operation of a railroad substantially as alleged in said complaint; admits that Frank B. Mase, plaintiff's intestate, was in the employ of said defendant on or about the 3rd day of October, 1890, and prior thereto; admits that the plaintiff's intestate, said Frank B. Mase, was, on or about the 3rd day of October, 1890, killed.

Defendant, further answering the amended complaint of the plaintiff herein, denies each and every allegation in said complaint contained and every part thereof, except as hereinbefore expressly admitted and specifically denies that by reason of any of the matters or things mentioned in said amended complaint, the plaintiff or any one has been damaged in the sum of fifteen thousand dollars ($15,000) or any other sum whatsoever.

Wherefore defendant prays to be hence dismissed with its costs and disbursements incurred herein.

Dated December 28th, 1891.

JNO. C. BULLITT, JR.,
TILDEN R. SELMES,
Def't's Attorneys, St. Paul, Minnesota.

16 STATE OF MINNESOTA, } ss:
County of Ramsey, }

Tilden R. Selmes being duly sworn says that he is an officer, to wit assistant counsel of the defendant herein; that he has read the

foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

TILDEN R. SELMES.

Subscribed and sworn to before me, this 28th day of December, A. D. 1891.

EDWIN IRLE,

[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

Indorsed: Answer. Filed Dec. 29th, 1891. Oscar B. Hillis, clerk.

And afterwards on the 21st day of July the following order submitting this cause was entered of record in said cause, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1893.

FRIDAY MORNING, *July* 21*st*, 1893.

Court opened pursuant to adjournment.
Present: Hon. John A. Williams, judge.

CLARA MASE
vs.
NORTHERN PACIFIC RAILROAD COMPANY. } E. Law. 908.

The jury having been waived herein by stipulation duly filed of record, and said cause coming on to be heard upon the stipulated facts the same is argued on behalf of the *plain* plaintiff by W. A. Shumaker and on behalf of the defendant by John C. Bullitt, Jr., duly submitted and by the court taken under advisement.
T. M., vol. 8, p. 75.

And afterwards on the 5th day of July, 1893, the following stipulation of facts and damages was filed of record in said cause, to wit:

17 United States Circuit Court, District of Minnesota, Third Division.

CLARA MASE, as Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated, by and between the parties to the above-entitled cause that the following, in addition to the matters admitted by the pleadings, may be taken as the facts in this case for all the purposes thereof:

That the plaintiff is the duly appointed and legally qualified ad-

ministratrix of the estate of Frank B. Mase, deceased, and is the widow of said deceased.

That at all the times hereinafter mentioned plaintiff's intestate, Frank B. Mase, was in the employ of the defendant as an engineer on one of its passenger trains, and was on the 3rd day of October, 1890, engaged as such engineer upon the engine of a certain train mentioned and referred to in the testimony hereto annexed as passenger train No. 2.

That on the 3rd day of October, 1890, while so engaged in the performance of his duties as such engineer upon said train said Frank B. Mase was killed in an accident occurring at or near Butler in the State of Montana, caused by said train on which plaintiff's intestate was so employed running upon a certain side track or safety track by reason of a misplaced switch, and thus colliding with certain cars and a certain engine mentioned as engine No. 483, which stood upon said side or safety track.

That said switch was so misplaced or left open by one B. L. Short, the conductor of the train mentioned as No. 58, of which said engine No. 483 was a part.

That the circumstances of said accident are as stated in the testimony of Marshall Nixon given at the coroner's inquest on the body of said Frank B. Mase, a copy of which is hereto attached and made a part of this stipulation.

That the trains referred to herein or in said testimony were trains owned and controlled by defendant in operating its lines of railway in said State of Montana and elsewhere, and that the persons engaged in and about said trains were in the employ of the defendant.

That the said accident was caused solely by the carelessness and negligence of said B. L. Short and the carelessness and negli-
18 gence of said B. L. Short in permitting said switch to remain open and out of place was the proximate cause of said accident and the death of said Frank B. Mase. That said Frank B. Mase was free from all carelessness or negligence whatever in the premises.

It is further stipulated and agreed that all the rules set forth in the complaint and any and all of the rules contained in defendant's rule book hereto attached may be read and referred to by either party in all proceedings that may be had in this case with the same force and effect as though the same were fully set out herein, and the adoption and promulgation of said rules for the guidance of its employés is hereby admitted on behalf of the defendant.

That the statutes of the State of Montana may be read and referred to by either party in all proceedings that may be had in this case from the printed copies thereof generally in use, without further proof of passage and with full force and effect.

It is further stipulated and agreed that by reason of the matters herein set forth the plaintiff, as the personal representative of said Frank B. Mase, deceased, has sustained damages in the sum of four thousand ($4,000) dollars.

Said B. L. Short had no control or direction whatever over said plaintiff's intestate, other than as given by the rules of the company.

It is further stipulated and agreed that a jury is hereby waived in all proceedings that may be had herein in which either party would otherwise be entitled to a jury, and that the court may order judgment herein in accordance with the facts admitted by the pleadings and herein stipulated and the law of the land.

ERWIN AND WELLINGTON,
Attorneys for Plaintiff.
JNO. C. BULLITT, JR.,
TILDEN R. SELMES,
Attorneys for Defendant.

Dated St. Paul, Minn., Dec. —, 1892.

MARSHALL NIXON, being duly sworn, says:

I live at Missoula. I am railroad brakeman. At the time of the accident on Oct. 3rd I was at Butler. I was braking for Cond'r Short on train No. 58 bound for Helena from Missoula. Our train broke in two in the tunnel, we tried to back her up and
19 couple her together again, but the train was too heavy for the engine and we could not get it together. Then we came down to Butler with the front part of the train and put her in on the side track on the left of the main line coming down. I cut the engine off and took it on the main line and Mr. Short said to back it up and put it on the safety switch and I did so and closed the switch after me and put the lock in the keeper of the switch. Then I went to the telegraph office after Mr. Short. I was there about twenty minutes then Mr. Short came out and I followed after him, and he says to me Go down and tell that engineer (meaning our engineer) to back out and come down on the head end of the train. And he said I will let him out. Then he (Mr. Short) went right across the track and opened the switch, and he says to me Fly down and turn all the retainers down back of the furniture cars, and I did so, and as I went down I told the engineer that Short wanted him to back up, and he said there was not room to clear down there. Then I halloaed and told Short they could not clear down there. Short gave me a rough answer and said for me to go and see. I went and seen and did not think there was room there myself. Then I went back and went into the office and asked him what we was going to do. He said he was going to unload some stuff if we ever got out of there and was kind of mad and did not talk much after that. About that time he stepped out *on* of the telegraph office and the passenger train was coming down the hill and Short said just as soon as I come on the platform "My God, that switch!" Just then No. 2 came past the platform and ran into the safety switch.

There was Harry Cromwell's engine (engine No. 483) first and another engine and some cars on that track. I just threw down my brake club and ran down to the wreck. I heard a man holler and I ran on to the fireman of No. 2. I pulled him out of the hot water

and he said Where is Frank? Then I heard another man holler right below me. I went down to him about 20 or 30 feet from his engine where I found Engineer Frank Mase lying in a pool of water that had run out of the engine. From there I pulled him back and run to get some help. His fireman, as I passed him, said Get a board for me, quick. I went right up and told a lot of boys belonging to other trains that were in and passenger- to come down and give me some help; that two men were dying. That crowd rushed down, and begun to take care of them. I went to look if somebody else was hurt. I went to see Mase three or four times. He died within half an hour.

There was no light on the safety switch.

Indorsed: Stipulation of facts and damages. Filed July 5th, 1893. Oscar B. Hillis, clerk.

20 And afterwards to wit on the 21st day of August, 1891, the following decision of Judge John A. Williams was filed of record in said cause, to wit:

United States Circuit Court, District of Minnesota, Third Division.

CLARA MASE, as Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Irwin & Wellington for plaintiff, John C. Bullitt, Jr., and T. R. Selmes for defendant.

WILLIAMS, *J.*:

This case is submitted upon the following agreed statement of facts:

That the plaintiff is the duly appointed and legally qualified administratrix of the estate of Frank B. Mase, deceased, and is the widow of said deceased.

That at all times hereinafter mentioned plaintiff's intestate, Frank B. Mase, was in the employ of the defendant as an engineer on one of its passenger trains, and was, on the 3d day of October, 1890, engaged as such engineer upon the engine of a certain train mentioned and referred to in the testimony hereto annexed as passenger train No. 2.

That on said 3d day of October, 1890, while so engaged in the performance of his duties as such engineer upon said train, said Frank B Mase was killed in an accident occurring at or near Butler in the State of Montana, caused by said train on which plaintiff's intestate was so employed running upon a certain side track or safety track, by reason of a misplaced switch, and thus colliding with certain cars and a certain engine mentioned as engine No. 483, which stood upon said side track or safety track.

That said switch was so misplaced or left open by one E. L. Short,

the conductor of the train mentioned as No. 58, of which said engine No. 483 was a part.

That the circumstances of said accident are as stated in the testimony of Marshall Nixon, given at the coroner's inquest on the body of said Frank B. Mase, a copy of which is hereto attached, and made a part of this stipulation.

That the trains referred to herein or in said testimony were trains owned or controlled by defendant in operating its lines of railway in said State of Montana and elsewhere, and that the persons engaged in and about said trains were in the employ of the defendant.

21 That said accident was caused solely by the carelessness and negligence of said B. L. Short in permitting said switch to remain open and out of place, and said carelessness and negligence of said B. L. Short was the proximate cause of said accident, and of the death of Frank B. Mase. That said Frank B. Mase was free from all carelessness and negligence whatever in the premises.

It is further agreed and stipulated that all the rules set forth in the complaint, and any and all of the rules contained in defendant's rule book hereto attached may be read and referred to by either party in all proceedings that may be had in this case with the same force and effect as though the same were fully set out herein, and the adoption and promulgation of said rules for the guidance of its employés is hereby admitted on behalf of the defendant.

That the statutes of the State of Montana may be read and referred to by either party in all proceedings that may be had in this case from the printed copies thereof generally in use, without further proof of passage, and with full force and effect.

It is further stipulated and agreed that by reason of the matters herein set forth the plaintiff, as the personal representative of said Frank B. Mase, deceased, has sustained damage in the sum of four thousand dollars ($4,000).

Said B. L. Short had no control or direction whatever over said plaintiff's intestate, other than as given by the rules of the company.

It is further stipulated and agreed that a jury is hereby waived in all proceedings that may be had herein in which either party would otherwise be entitled to a jury, and that the court may order judgment herein in accordance with the facts admitted by the pleadings and herein stipulated, and the law of the land.

ERWIN & WELLINGTON,
Attorneys for Plaintiff.
JOHN C. BULLITT, JR.,
TILDEN R. SELMES,
Attorneys for Defendant.

MARSHALL NIXON, being duly sworn, says:

I live at Missoula. I am a railroad brakeman. At the time of the accident on Oct. 3rd I was at Butler. I was braking for Cond'r Short on train No. 58 bound for Helena from Missoula. Our train

broke in two in the tunnel, we tried to back her up and couple
22 her together again, but the train was too heavy for the engine and we could not get it together. Then we came down to Butler with the front part of the train and put her in on the side track on the left of the main line coming down. I cut the engine off and took it out on the main line and Mr. Short said to back it up and put it on the safety switch, and I did so, and closed the switch after me and put the lock in the keeper of the switch. Then I went to the telegraph office after Mr. Short. I was there about twenty minutes then Mr. Short came out and I followed after him, and he says to me Go down and tell that engineer (meaning our engineer) to back out and come down on the head end of the train. And he said I will let him out. Then he (Mr. Short) went right across the track and opened the switch, and he says to me, Fly down and turn all the retainers down back of the furniture cars, and I did so, and as I went down I told the engineer that Short wanted him to back up, and he said there was not room to clear down there. Then I holloaed and told Short they could not clear down there. Short gave me a rough answer and said for me to go and see. I went and seen and did not think there was room there myself. Then I went back and went into the office and asked him what he was going to do. He said he was going to unload some stuff if we ever got — of there, and was kind of mad and did not talk much after that. About that time he stepped out *on* of the telegraph office and the passenger train was coming down the hill and Short said just as soon as I come on the platform "My God, that switch." Just then No. 2 came past the platform and ran into safety switch. There was Harry Cromwell's engine (engine No. 483) first and another engine and some cars on that track. I just threw down my brake club and ran down to the wreck. I heard a man holler and I ran on to the fireman of No. 2. I pulled him out of the hot water, and he said, Where is Frank? Then I heard another man holler right below me. I went down to him about 20 or 30 feet from his engine where I found Engineer Frank Mase lying in a pool of water that had run out of the engine. From there I pulled him back and ran to get some help. His foreman, as I passed him, said Get a board for me, quick. I went right up and told a lot of boys belonging to other trains that were in and passenger- to come down and give me some help; that two men were dying. That crowd rushed down, and begun to take care of them. I went to look if somebody else was hurt. I went to see Mase three or four times. He died within half an hour.

There was no light on the safety switch.

The rules of the corporation that relate to this case, and as admitted by the stipulation, as- as follows:

23 A switch must never be left open for another train or engine, upon the supposition that its conductor will close it, unless such conductor assumes its charge. Conductors, brakemen or others handling switches, must stand by them until relieved or until switches are closed.

The conductor who uses a switch is responsible for its position, unless the switchman or other conductor or engineer personally assumes its charge.

Conductors have full authority over the employés of trains they are placed in charge of; and such conductors are held responsible by the company for the safe management of their trains, and for the strict performance of their duties on the part of the men engaged with them.

Section 697 of the Compiled Statutes of Montana provides as follows: "That in every case the liability of the corporation to a servant or employé acting under the orders of his superior shall be the same as in case of injury sustained by the default or wrongful act of his superior or to an employé not appointed or controlled by him as if such servant or employé were a passenger."

Upon this state of facts, the only questions which arise are:

First. Whether the defendant corporation is relieved from liability to the plaintiff by reason of the claim by the defendant that Conductor Short was a fellow-servant with the plaintiff's intestate at the time the injury occurred; and

Second. Whether the statutes of Montana relied upon by the plaintiff, create any greater or different liability on the part of the defendant than the liability created or recognized by the general law.

Whether Conductor Short was at the time of the injury a fellow-servant of Mase the deceased, is the real question to be determined in this case; and in its determination I do not deem it necessary to endeavor to reconcile the conflicting opinions of the various courts upon this question. I am very much impressed with the language of Justice Miller in the case of Garrahy *v.* R. R. Co., 25 Fed. Rep., 258, in which the eminent jurist says: "The question thus presented is one which has been much considered of late in the courts of last resort of all the States, and much discussed at the bar in those and in the inferior courts. There is no unanimity in the decisions of the courts nor in the opinions of the profession."

It would seem that the decision in the Ross case, 112 U. S., 377, settled that the conductor of a railway train was, by reason
24 of the superiority of his position a vice principal, and not a fellow-servant, of the employés under him.

But defendant claims that by the decision by the same court in the case of B. & O. R. R. *v.* Baugh; Sup. Ct. Rep., June 5, 1893, the doctrine of the superiority of one employé over another constituting him a vice-principal and not a coservant, as laid down in the Ross case, is eliminated, and that the latter case as far as it conflicts with the decision in the Baugh case is overruled.

In the case of B. & O. R. R. Co. *v.* Andrews, 1 U. S. Court of Appeals, 636, Justice Sage, delivering the opinion of the court holds that a brakeman on one train is a coservant with the conductor and engineer on another train, and if killed in a collision caused entirely by the negligence of the latter, the company is not liable. In the case of Randall *vs.* B. — O. R. R. Co., 109 U. S. S. C., the court holds that the fact that the employés were working on different

trains is entirely immaterial in the consideration of the question as to whether they were or were not fellow-servants.

After due consideration of the various decisions which may be characterized, at least, as conflicting, I am of the opinion that this case must be decided upon the question as to what duties devolved upon Conductor Short at the time of the injury, under the facts and circumstances of this case. If such duties were assigned to him as made him the representative of the defendant, for the time being, then he was a vice-principal and not a fellow-servant. The rules of the company make it imperative upon him that when he opens the switch he must stand by it until relieved, or until such switch is closed, and it holds him responsible for its position until another conductor assumes its charge. And while this may not be considered as a part of the duty of the defendant to provide a safe road-bed instrumentalities and appliances, yet it was a delegation by the defendant to the conductor of a duty of the same kind and character that it owed to the employé. This duty might have been delegated by the defendant to a brakeman or a switchman; but I am of the opinion, that when the defendant selected any one person to discharge this duty, he must be considered in law as a vice-principal and not a coservant. It does not depend upon the question of superiority, but upon the question of the delegation of a duty that originally devolved upon the principal, to that person; for the rules of the company are very strict in holding the conductor responsible for the position of the switch and delegate that important-

duty to him.

25 It is true it may be said that the performance of the duty of properly setting the switch depends upon the care of an employé, and that therefor- it is his negligence alone which prevents its proper performance. But this is equally true of any of the positive duties of the employer. Competent servants cannot always be obtained, and reckless and incompetent ones cannot be discovered and discharged without the exercise of care on the part of those whose duty it is to hire and discharge the men. Proper and safe cars cannot be built without due care on the part of the master mechanics and men in charge of the car shops. Cars cannot be kept in proper repair except by the exercise of diligence on the part of the inspectors. The road-bed and all its appurtenances cannot be kept in repair and in safe condition except by the exercise *a*of care on the part of the employés and servants upon whom that duty devolves. Yet if an accident is caused by the negligence of any one of those employés in the performance of their duties, the company is responsible, because it has not used due care to provide its servants with reasonably safe places in which to work, or with reasonably safe instrumentalities with which to do the work. So in like manner the track cannot be kept in safe condition for those passing over it, without due care on the part of persons to whom is delegated the duty of setting the switches, and for a failure to perform this duty I hold that the defendant is liable in this case.

This duty was delegated to the conductor. He neglects that duty and leaves the switch open, and the court cannot say that

Frank Mace, the deceased, standing at his post of duty rushing in the darkness to inevitable destruction has been provided with a reasonably safe place in which to work, and that this negligence, under the circumstances, is the negligence of a coservant, and not of a vice-principal.

Under the foregoing statement of facts, and in this view of the case, it is unnecessary to consider the effect of the statute of Montana upon this case. I might say, however, that the language is not very clear, but it seems to refer to a servant or employé acting under the order of his superior, and would seem to be an attempt to graft the principles laid down in the Ross case upon the statutes of that State; and it adds nothing to the general law as applicable to this case.

Let judgment be entered for the plaintiff in the stipulated sum of four thousand dollars.

JOHN A. WILLIAMS,
U. S. Dist. Judge.

26 Since filing the foregoing opinion my attention has been called to the case of The N. P. R. R. Co. *vs.* Cavanaugh, 51 Fed. Rep. 517—a case decided by the circuit court of appeals of the eighth circuit and which is of course binding on me in the decision of this case. The principle involved in that case is exactly similar to this case. The circuit court of appeals in that case say: "The facts in this case bring it clearly within the decision of the Supreme Court in R. R. Co. *vs.* Ross, 112 U. S. Supreme Court 377 and the judgment below is affirmed with costs." The verdict in that case being for the plaintiff for injuries by reason of the negligence of the defendant corporation.

JNO. A. WILLIAMS, *Judge.*

Indorsed: Judge Williams' decision ordering judgment for pl'ff of $4,000, as in stipulation of facts. Filed Aug. 21st, 1893. Oscar B. Hillis, clerk.

And on the 21st day of August, 1893, the following order of court was entered of record in said cause, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1893.

MONDAY MORNING, *August* 21*st*, 1893.

Court opened pursuant to adjournment.
Present: Hon. John A. Williams, judge.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, *vs.* NORTHERN PACIFIC RAILROAD COMPANY.	E. Law. 908.

A jury having been waived herein by a written stipulation duly filed of record in said cause and the same having been tried by the

court upon an agreed statement of facts duly submitted and by the court *and* taken under advisement.

Now after being fully advised in the premises, the court files its written decision; pursuant thereto it is considered ordered and adjudged that the above-named plaintiff do have and recover of and from the above-named defendant the sum of four thousand dollars ($4,000.00) besides her costs and disbursements herein to be taxed and that she have execution therefor.

T. M. vol. 8, p. 151.

And on the 11th day of September, 1893, the following bill of exceptions was filed of record in said cause, to wit:

27 *Bill of Exceptions.*

United States Circuit Court, District of Minnesota, Third Division.

CLARA MASE, Administratrix of the Estate of Frank B. Mase, Deceased, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This action came on for trial at the June term of said court for 1893, at St. Paul, Minnesota, on the 21st day of August, 1893, before the Honorable John A. Williams, without a jury, it being stipulated, in open court, by the parties thereto, that the case should be tried without a jury; and thereupon it was agreed between the parties in interest that the facts in this case, in addition to those facts established by the pleadings, are as follows:

That the plaintiff is the duly appointed and legally qualified administratrix of the estate of Frank B. Mase, deceased, and is the widow of said deceased.

That at all the times hereinafter mentioned plaintiff's intestate, Frank B. Mase, was in the employ of the defendant as an engineer on one of its passenger trains, and was, on the 3rd day of October, 1890, engaged as such engineer upon the engine of a certain train mentioned and referred to in the testimony hereto annexed as passenger train No. 2.

That on the third day of October, 1890, while so engaged in the performance of his duties as such engineer upon said train said Frank B. Mase was killed in an accident occurring at or near Butler in the State of Montana, caused by said train on which plaintiff's intestate was so employed running upon a certain side track or safety track, by reason of a misplaced switch, and thus colliding with certain cars and a certain engine mentioned as engine No. 483, which stood upon said side track or safety track.

That said switch was so misplaced or left open by one B. L. Short, the conductor of the train mentioned as No. 58, of which said engine No. 483 was a part.

That the circumstances of said accident are as stated in the testimony of Marshal Nixon, given at the coroner's inquest on the body

of said Frank B. Mase, a copy of which is hereto attached and made a part of this stipulation.

That the trains referred to herein or in said testimony were trains owned and controlled by defendant in operating its lines
28 of railway in said State of Montana and elsewhere, and that the persons engaged in and about said trains were in the employ of the defendant.

That said accident was caused solely by the carelessness and negligence of said B. L. Short and the carelessness of said B. L. Short in permitting said switch to remain *upon* and out of place was the proximate cause of said accident and of the death of said Frank B. Mase. That said Frank B. Mase was free from all carelessness or negligence whatever in the premises.

It is further stipulated and agreed that all the rules set forth in the complaint and any and all of the rules contained in defendant's rule book hereto attached, may be read and referred to be either party in all proceedings that may be had in this case with the same force and effect as though the same were fully set out herein, and the adoption and promulgation of said rules for the guidance of its employés is hereby admitted on behalf of the defendant.

That the statutes of the State of Montana may be read and referred to by either party in all proceedings that may be had in this case from the printed copies thereof generally in use, without further proof of passage and with full force and effect.

It is further stipulated and agreed that by reason of the matters herein set forth the plaintiff, as the personal representative of said Frank B. Mase, deceased, has sustained damages in the sum of four thousand ($4,000.00) dollars.

Said B. L. Short had no control or direction whatever over said plaintiff's intestate, other than as given by the rules of the company.

It is further stipulated and agrees that a jury is hereby waived in all proceedings that may be had herein in which either party would otherwise be entitled to a jury, and that the court may order judgment herein in accordance with the facts admitted by the pleadings and herein stipulated and the law of the land.

Thereupon the court upon the foregoing facts rendered judgment for the plaintiff for the sum of four thousand ($4,000.00) dollars and costs and disbursements, being the amount that was stipulated and damages should be assessed if the court found that the plaintiff should recover, to which order the defendant then and there duly excepted, which exception was allowed and thereupon judgment was entered in accordance with said order.

29 UNITED STATES OF AMERICA, }
District of Minnesota, Third Division, } *ss:*

I, John A. Williams, U. S. district judge of the eastern district of Arkansas, holding a term of the circuit court of said circuit, by assignment of Hon. Henry C. Caldwell, United States circuit judge of the eighth circuit, who presided at the trial of the aforesaid case,

do hereby certify that the foregoing contains all the evidence given upon the trial of said action, together with all objections to evidence, the rulings thereon and the exceptions thereto taken, as well as proceedings and motions made and entered on said trial, and the rulings thereon and exceptions thereto; and forasmuch as none of the matters aforesaid appear of record in said cause, I have, at the request of the defendant's attorney, settled, signed and sealed the foregoing as and for the bill of exceptions in said cause.

In testimony whereof, I have hereunto set my hand this 11th day of September, A. D. 1893.

JOHN A. WILLIAMS, *Judge.*

EXHIBIT "A."

MARSHALL NIXON, being duly sworn, says:

I live at Missoula. I am a railroad brakeman. At the time of the accident on Oct. 3rd, I was at Butler. I was braking for Cond'r Short on train No. 58, bound for Helena from Missoula. Our train broke in two in the tunnel; we tried to back her up and couple her together again, but the train was too heavy for the engine and we could not get it together. Then we came down to Butler with the front part of the train and put her in on the side track on the left of the main line coming down. I cut the engine off and took it out on the main line and Mr. Short said to back it up and put it on the safety switch and I did so and closed the switch after me and put the lock in the keeper of the switch. Then I went to the telegraph office after Mr. Short. I was there about twenty minutes; then Mr. Short came out and I followed after him, and he says to me, Go down and tell that engineer (meaning our engineer) to back out and come down on the head end of the train, and he said I will let him out. Then he (Mr. Short) went right across the track and opened the switch, and he says to me, Fly down and turn all the retainers down back to the furniture cars, and I did so, and as I went down I told the engineer that Short wanted him to back up, and he said there was not room to clear down there. Then I halloa-d and told Short they could not clear down there. Short gave me a rough answer and said for me to go and see. I went and seen and did not think there was room there myself; then I went back and went into the office and asked him what we was going to do. He said he was going to unload some stuff if ever we got out of there, and was kind of mad and did not talk much after that. About that time he stepped out of the telegraph office and the passenger train was coming down the hill and Short said just as soon as I come on the platform, "My God, that switch," just then No. 2 came past the platform and ran into the safety switch. There was Harry Cromwell's engine (engine No. 483) first and another engine and some cars on that track. I just threw down my brake-club and ran down to the wreck. I heard a man holler and I ran on to the fireman of No. 2. I pulled him out of the hot water and he said, "Where is Frank?" Then I heard *heard* another man holler right below me. I went down to

him about 20 or 30 feet from his engine where I found Engineer Frank Mase lying in a pool of water that had run out of his engine. From there I pulled him back and run to get some help. His fireman, as I passed him, said get a board for me quick. I went right up and told a lot of boys belonging to other trains that were in and passenger- to come down and give me some help; that two men were dying. That crowd rushed down and begun to take care of them. I went to look if somebody else was hurt. I went to see Mase 3 or 4 times. He died within half an hour.

There was no light on the safety switch.

Indorsed: Settled case. Filed Sept. 11, 1893. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable, the United States circuit court of appeals for the eighth circuit, that the foregoing, consisting of 58 pages, numbered consecutively from 1 to 58 inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal of the U. S. Circuit Court, Dist. of Minnesota, Third Division.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 8th day of November, A. D. 1893.

OSCAR B. HILLIS, *Clerk.*

31 United States circuit court, district of Minnesota, third division. Return to circuit court of appeals for eighth circuit.

Filed Dec. 4, 1893.

JOHN D. JORDAN, *Clerk.*

32 And on the fourth day of December, A. D. 1893, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, as Administratrix of the Estate of Frank B. Mase, Deceased, Defendant in Error.
} No. 383.

The clerk will please note our appearance as counsel for the defendant in error above named in the above-entitled cause.

Dated November 4, 1893.

W. W. IRWIN AND
WALTER A. SHUMAKER,
Counsel for Def't in Error.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 383. Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, as administratrix of the estate of Frank B. Mase, deceased. Appearance. Filed Dec. 4, 1893. John D. Jordan, clerk. W. W. Erwin and Walter A. Shumaker, counsel for def't in error.

And on the eleventh day of December, A. D. 1893, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

33 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of Estate of Frank B. Mase, Deceased.
} No. 383.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

JOHN H. MITCHELL, JR., &
TILDEN R. SELMES.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 383. Northern Pacific R. R. Co., pl'ff in error, *vs.* Clara Mase, adm'x, &c. Appearance. Filed Dec. 11, 1893. John D. Jordan, clerk. J. H. Mitchell, Jr., Tilden R. Selmes, counsel for pl'ff in error.

And on the seventh day of May, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals in said cause a motion and affidavit of defendant in error to dismiss in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of the Estate of Frank B. Mase, Defendant in Error.

34 You will please take notice that at the regular May term of the above-named court, appointed to be held at the United States court-house, in the city of St. Paul, State of Minnesota, on Monday, the 7th day of May, 1894, at the hour of opening of said court on that day, or as soon thereafter as counsel can be heard, the defendant in error will present to the court the motions hereto annexed.

Said motions will be made upon the affidavit hereto attached and the records and files therein referred to.

Dated this 23rd day of April, 1894.

W. W. ERWIN,
WALTER A. SHUMAKER.
Counsel for Defendant in Error.

To J. H. Mitchell, Jr., and Tilden R. Selmes, counsel for plaintiff in error.

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of the Estate of Frank B. Mase, Defendant in Error.

The defendant in error, by her counsel, now moves the court to dismiss the writ of error issued in the above-entitled cause on the ground that no proper petition was ever filed for said writ of error; that no proper citation was ever issued and served, and that no proper bond for costs was ever given, in this, that the said plaintiff in error had no lawful power or authority to make said petition or to give said bond, and generally upon the ground that the plaintiff in error has not legal capacity to act.

35 Should said motion be by the court denied, then defendant in error, by her counsel, moves the court that the plaintiff in error be ordered to make and file a proper bond, with sureties, to secure the payment of the judgment of the circuit court of the district of Minnesota in this cause should the same be affirmed.

Dated this 23rd day of April, 1894.

W. W. ERWIN,
WALTER A. SHUMAKER,
Counsel for Defendant in Error.

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of the Estate of Frank B. Mase, Defendant in Error.

STATE OF MINNESOTA, *County of Ramsey*, } *ss*:

W. W. Erwin, being first duly sworn, on oath deposes and says—That he is one of the attorneys of the defendant in error in the above-entitled cause; that the judgment which the writ of error in this cause is brought to review was entered in the United States circuit court for the third division of the district of Minnesota on the 21st day of August, 1893; that on the 15th day of August, 1893, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were duly appointed by the circuit court of the district of Minnesota receivers of The Northern Pacific Railroad Company, the plaintiff in error above named, and ever since said 15th day of August, 1893, the said Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse have
36 been and now are the duly appointed, qualified, and acting receivers of said Northern Pacific Railroad Company and have been and now are in full possession of all its lines and systems of railway and engaged in the operation of the same under the laws of the United States of America and the rules and orders of court; that all the proceedings had in and about the appointment of said receivers will fully appear by the files and records of the United States circuit court for the third division of the district of Minnesota, to which affiant asks leave to refer.

That the petition of the plaintiff in error for a writ of error to bring the said judgment before this court was made on the 7th day of October, 1893, and was made in the name of the Northern Pacific Railroad Company, as petitioner for such writ of error; that in the citation served upon the defendant in error the Northern Pacific Railroad Company was named as plaintiff in error; that on the 7th day of October, 1893, the said plaintiff in error gave a bond to secure the payment of costs upon said writ of error, and that the same was made and executed by the Northern Pacific Railroad Company, by Tilden R. Selmes, its attorney, as principal, all of which will fully appear by the transcript of record and by the records of this court in this cause, and affiant asks leave to refer to the same.

That no other petition than that above referred to was filed in said cause before the issuing of the writ of error or at any other time; that no citation other than as above mentioned has ever been served upon defendant in error; that no bond for costs other than as above mentioned has ever been filed in said cause; that the said receivers of said Northern Pacific Railroad Company have not at any time filed any petition for a writ of error to review the judgment of the United States circuit court for the district of Minnesota in this cause; that said receivers have not given any bond to pay

the costs of this writ of error; that said receivers have not taken any proceedings whatsoever in this or any other court in relation to this cause or writ of error.

37 Affiant further says that the said plaintiff in error has failed and neglected to give any bond upon this writ of error to secure the payment of the judgment in this cause should said judgment be affirmed.

Wherefore affiant prays that the writ of error herein be dismissed or that, in case of the denial of said motion, the plaintiff in error be ordered to furnish and file a proper bond with sureties as security for the payment of the judgment herein should the same be affirmed.

W. W. ERWIN.

Subscribed and sworn to before me this 23rd day of April, 1894.

WALTER A. SHUMAKER,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

Endorsed: No. 383. U. S. circuit court of appeals, 8th circuit. N. P. R. R. Co., pl'ff in error, against Clara Mase, adm'x, def't in error. Affidavit and motion. Due service of the within by copy is hereby admitted this 23 day of April, A. D. 1894. J. H. Mitchell, Jr., & Tilden R. Selmes, att'y- for pl'ff in error. W. W. Erwin and Walter A. Shumaker, att'ys for def't in error, 124, 125, 126, and 127 Germania Life Ins. b'ld'g, St. Paul, Minnesota. Filed May 7, 1894. John D. Jordan, clerk.

And on the 7th day of May, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an order in said cause denying the motion to dismiss in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

38 MONDAY, *May* 7, 1894.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix, &c., Defendant in Error. } No. 383.

In error to the circuit court of the United States for the district of Minnesota.

This cause came on to be heard upon the motion of defendant in error to dismiss this cause and was argued by counsel, Mr. Walter A. Shumaker, in support thereof, and Mr. J. H. Mitchell, Jr., opposing.

On consideration whereof it is now here ordered by this court that the said motion to dismiss be, and the same is hereby, denied.

And on the fifteenth day of May, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an entry of submission of said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

TUESDAY, *May* 15, 1894.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix, etc., Defendant in Error. } No. 383.

In error to the circuit court of the United States for the district of Minnesota.

39 This cause, having been called for hearing in its regular order, was argued by Mr. John H. Mitchell, Jr., in behalf of plaintiff in error and by Mr. Walter Shumaker in behalf of defendant in error.

Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the sixteenth day of July, A. D. 1894, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

40 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of Estate of Frank B. Mase, Defendant in Error. } No. 383. In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. J. H. Mitchell, Jr. (Mr. Tilden R. Selmes was with him on the brief), for plaintiff in error.

Mr. Walter A. Shumaker (Mr. W. W. Erwin was with him on the brief), for defendant in error.

Before Caldwell and Sanborn, circuit judges, and Thayer, district judge.

SANBORN, circuit judge, delivered the opinion of the court:

Is a railroad company liable under the general law for the injury of an employee on one train caused by the negligence of the conductor in its employment on another train in leaving a switch open that it was his duty to close?

If not, is it liable under section 697 of the Compiled Statutes of Montana for an injury to a fireman in its employment on one train, which was inflicted in Montana, and was caused by the negligence of a conductor in its employment on another train, in leaving a switch open?

These are the only questions presented by this record. The case

was tried by the court below, without a jury, upon an agree
41 statement of facts and a stipulation to the effect that if t
court was of the opinion that either of these questions shou
be answered in the affirmative, judgment should be rendered again
the plaintiff in error for four thousand dollars. The circuit cou
was of the opinion that the first question should be answered i
the affirmative, and upon that ground ordered the judgment,
reverse which this writ of error was sued out. Mase *v.* Norther
Pacific Railroad Company, 57 Fed. Rep., 383.

In our opinion the conductor of a railroad train, through whos
negligence in operating the railroad an employee of the same con
pany on another train is injured is a fellow-servant of the latt
under the general law, and on that account the common master
exempt from liability for an injury caused by his negligence, an
the court below should have answered the first question in the nega
tive. Our reasons for this opinion are stated, and some of th
authorities that support our conclusions are cited, in St. Louis, Iro
Mountain & Southern Railway Company *v.* Needham, — Fed. Re
—, decided at this term, and it is useless to repeat them here. W
turn to the consideration of the second question.

In the absence of legislative enactments the liability of a maste
to one of his employees for the negligence of the other is determin
able by the general law and not by the local law, and the decision
of the courts of the State in which the injury is inflicted are not co
trolling in the national courts.

But, whenever this subject is regulated by the statutes of the Stat
in which the injury is inflicted, these become the "rules of decisio
in trials at common law" in the national courts under section 72
of the Revised Statutes, and measure the duties and liabilities of th
litigants. Northern Pacific Railroad Co. *v.* Hogan, — Fed. Rep. —
decided by this court at this term; Chicago, Milwaukee & St. Pau
R'y Co. *v.* Rice, 112 U. S. 377; Baltimore & Ohio Railroad Co.
Baugh, 149 U. S. 368, 378; Northern Pacific Railroad Company
Hambly, — Sup. Ct. Rep. —; Hough *v.* Railroad Company, 10
U. S. 213, 226; Lake Shore & Michigan Southern Railway Company
Prentis, 147 U. S. 101, 106.

This case was tried in the circuit court for the district of Minne
sota, but the injury was inflicted in the State of Montana. Whil
it is true that the statutes of a State have in themselves no extra
territorial force, yet rights acquired under them are always enforce
by comity in the State and national courts in other States, unles
they are opposed to the public policy or laws of the forum. It i
settled by the decisions of the Supreme Court of the United State
and by the decisions of the supreme court of Minnesota that th
right to recover in an action of the character of that before us i
governed by the *lex loci* and not by the *lex fori*. Northern Pacific
Railroad Company *v.* Babcock, — Sup. Ct. Rep. —; Herrick *v*
Minneapolis & St. Louis R'y Co., 31 Minn. 11; The Antelope, 1
Wheaton, 66; Smith *v.* Cowdry, 1 Howard, 28; The China, 7 Wall
53, 64; Dennick *v.* Railroad Company, 103 U. S. 11; The
42 Scotland, 105 U. S. 124, 129; Texas & Pacific R'y Co. *v.* Cox
145 U. S. 593; Huntington *v.* Attrill, 146 U. S. 670.

The result is that the right of recovery in this action, if it exists at all, must rest on the statute of Montana. That statute provides: "That in every case the liability of the corporation to a servant or employee, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him as if such servant or employee were a passenger." Sec. 697, chap. 25, Compiled Statutes of Montana, 1887.

This section is found in a chapter of the general laws of Montana relating to railroad corporations, and it seems to affect the liability of such corporations only. It goes without saying that the purpose of this statute was to extend the liability of railroad companies to their servants for the negligence of servants of a higher grade. It is equally clear that the pronoun "him" in the clause "or to an employee not appointed or controlled by him" refers to the employee's "superior," and that the intention of the legislature was to extend the liability of the companies for the negligence of superior servants for the benefit of two classes of employees, viz: those injured by the default or wrongful act of a superior employee under whose orders they were acting, and those injured by the default or wrongful act of a superior servant who did not appoint and who had no control over them. The statute is inartificially drawn, but its meaning is not doubtful and its obscurity at once disappears if the clause "or to an employee not appointed or controlled by him" is transposed to its grammatical and logical position in the sentence and placed before the verb. Then the statute would read: "That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, or to an employee not appointed or controlled by him, shall be the same in case of injury sustained by default or wrongful act of his superior, as if such servant or employee were a passenger."

Now the conductor, whose negligence in leaving the switch open, caused the death of a fireman on another train in this case, was the superior of that fireman in the employment of the same master. His rank or grade in the service was higher. The fireman, it is true, was not acting under his orders, and was not one of the first class protected by the statute, but he was an employee "not appointed or controlled" by this superior, whose default caused his injury, and he was clearly one of the second class to whom a right of action for such a default was given by this statute. The effect of the statute is to give a cause of action against the railroad company to every servant, who is himself without fault, for the default or wrongful act of any superior servant whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury. This was the construction given to this statute by Judge Shiras, of the northern district of Iowa, upon the circuit, and we have no doubt of its correctness. Ragsdale *v.* Northern Pacific Railroad Company, 42 Fed. Rep., 381, 386.

43 That the railroad company would have been liable for any injury resulting to a passenger on the train that ran through

the open switch, from the negligence of the conductor who lef
open, admits of no discussion. It follows that under this statu
and the stipulation in this case the railroad company was liable
the defendant in error to the same extent for the injury to the
ceased fireman that it would have been to a passenger, and on t
ground the judgment must be affirmed. It is so ordered.
Filed July 16, 1894.

44 And on the sixteenth day of July, A. D. 1894, in the r
ord of the proceedings of said circuit court of appeals, is
entry of judgment in said cause in the words and figures followi
to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Ter
1894.

MONDAY, *July* 16, 1894.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of Estate of Frank B. Mase, Deceased, Defendant in Error. } No. 3

In error to the circuit court of the United States for the district
Minnesota.

This cause came on to be heard on the transcript of the reco
from the circuit court of the United States for the district of Mi
nesota and was argued by counsel.
On consideration whereof it is now here ordered and adjudged
this court that the judgment of the said circuit court in this cau
be, and the same is hereby, affirmed with costs, and that Clara Ma
administratrix of estate of Frank B. Mase, deceased, recover against t
Northern Pacific Railroad Company the sum of twenty dollars
her costs herein and have execution therefor.
July 16, 1894.

And on the twenty-second day of September, A. D. 1894, the
was filed in the clerk's office of said circuit court of appe
45 an assignment of errors in said cause in words and figu
following, to wit:

United States Supreme Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of the Estate of Frank B. Mase, Defendant in Error.

Now comes the above-named plaintiff in error, The Northe
Pacific Railroad Company, by James McNaught and John
Mitchell, Jr., its attorneys, and says that in the records and pr

ceedings in the above-entitled action in the United States circuit court of appeals for the eighth judicial circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before the said circuit court of appeals, to wit:

That the court erred in ordering that judgment be entered for plaintiff (defendant in error herein) upon the facts as stipulated in said action in that—

The negligence, as shown by the stipulated facts, which caused the injuries for which the plaintiff (defendant in error herein) seeks to recover was the negligence of a fellow-servant in the same line of employment with the plaintiff (defendant in error herein) and not the negligence of the defendant (plaintiff in error herein) or a servant or employé of the defendant or a servant or employé for whose negligence it would be responsible to the plaintiff (defendant in error herein).

Second. That said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Min-
46 nesota to said circuit court of appeals, erred in making its order on the sixteenth day of July, 1894, affirming the judgment of the said circuit court of the United States and directing a mandate to issue to the circuit court of the United States for the district of Minnesota directing that court to proceed in accordance with the decision and order of said circuit court of appeals.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court and in not directing a new trial of the issues raised by the pleadings in said action.

And the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment aforesaid, entered herein in the circuit court for the district of Minnesota, and the order entered therein as aforesaid by the circuit court of appeals, to wit, the judgment of affirmance rendered on the sixteenth day of July, 1894, for the errors aforesaid and for other errors in the records and proceedings aforesaid be reversed, annulled, and altogether held for naught, and that plaintiff in error may be restored to all things which it has lost by occasion of said judgment and order.

Dated Sept. 13, 1894.

JAMES McNAUGHT AND
JOHN H. MITCHELL, JR.,
Attorneys for Plaintiff in Error.

Endorsed: United States Supreme Court. Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, administratrix of the estate of Frank B. Mase, defendant in error. Assignments of error. Filed Sep. 22, 1894. John D. Jordan, clerk.

And on the twenty-second day of September, A. D. 1894,
47 there was filed in the clerk's office of said circuit court of

appeals a bond on writ of error in said cause in words and figu following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of Estate of Frank B. Mase, De- fendant in Error.

Know all men by these presents that we, said Northern Paci Railroad Company, a corporation created by and existing under act of the Congress of the United States of America entitled " act granting lands to aid in the construction of a railroad and te graph line from Lake Superior to Puget sound, on the Pacific coa by the northern route," approved July 2, 1864, by J. H. Mitche Jr., counsel, as principal, and J. W. Kendrick, of St. Paul, Minneso and J. M. Hannaford, of St. Paul, Minnesota, as sureties, are he and firmly bound unto the above-named Clara Mase, administratr of estate of Frank B. Mase, in the sum of five hundred dollars, la ful money of the United States of America, to be paid to the sa Clara Mase, administratrix of estate of Frank B. Mase, her executo administrators, and assigns; for the payment of which, well a truly to be made, we bind ourselves and each of us, our and ea of our heirs, executors, administrators, and the successors and assig of said company, jointly and severally by these presents.

Sealed with our seals and dated this 13th day of September, the year of our Lord one thousand eight hundred and ninety-fou

Whereas the above-named Northern Pacific Railroad Compa has prosecuted a writ of error in the Supreme Court of the Unit States to the circuit court of appeals for the eighth circuit
48 reverse the judgment rendered by said United States circu court of appeals herein under date of July 16th, 1894, affir ing the judgment of the circuit court of the United States for t district of Minnesota, rendered under date of August 21st, 1893, favor of said above-named Clara Mase, administratrix of the esta of Frank B. Mase, and against the said Northern Pacific Railroa Company:

Now, therefore, the condition of this obligation is such that if t above-named Northern Pacific Railroad Company shall prosecu said writ of error to effect and answer all costs if it shall fail make good its plea, then this obligation shall be void; otherwi the same shall be and remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By J. H. MITCHELL, JR., *Counsel.*
J. M. HANNAFORD. [SEAL.]
J. W. KENDRICK. [SEAL.]

In presence of—
JOHN G. DRESEN.
W. T. FRANCIS.

UNITED STATES OF AMERICA, }
District of Minnesota. }

J. W. Kendrick and J. M. Hannaford, being severally sworn, each for himself deposes and says that he is one of the sureties who executed the foregoing bond; that he, said J. W. Kendrick, is a resident and freeholder and he, said J. M. Hannaford, is a resident and freeholder in said district of Minnesota, and is worth the sum of one thousand dollars over and above all his just debts and liabilities.

J. M. HANNAFORD.
J. W. KENDRICK.

[SEAL.] Subscribed and sworn to before me this 13th day of Sep-
49 tember, 1894.

JOHN G. DRESEN,
Notary Public, Ramsey County, Minnesota.

The above and foregoing bond approved as to sufficiency of sureties.

WALTER H. SANBORN,
Circuit Judge.

Dated at St. Paul, Minn., Sept. 13th, 1894.

Endorsed: U. S. circuit court of appeals for the eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, adm'x of the estate of Frank B. Mase, defendant in error. Bond. Within bond is hereby approved as to form and sufficiency of sureties, Sept. 19, 1894. D. J. Brewer, justice. Filed Sep. 22, 1894. John D. Jordan, clerk.

And on the twenty-fifth day of September, A. D. 1894, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned:

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company, plaintiff in error, and Clara Mase, administratrix of estate of Frank B. Mase, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices afore-

said, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of September, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

Allowed by—
DAVID J. BREWER,
Asst. Justice Sup. Ct.

51 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said court at office, in the city of St. Paul, Minnesota, this 4th day of October, A. D. 1894.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] Original. U. S. Supreme Court. Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, adm'x of estate of Frank B. Mase, defendant in error. Writ of error. Filed Sep. 25, 1894. John D. Jordan, clerk.

52 And on the fourth day of October, A. D. 1894, a citation was filed in the clerk's office of said court of appeals in said cause, the original of which is hereto attached and herewith returned:

53 United States Circuit Court of Appeals for the Eighth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CLARA MASE, Administratrix of Estate of Frank B. Mase, Defendant in Error.

To Clara Mase, administratrix of the estate of Frank B. Mase, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof next, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Northern Pacific Railroad Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, justice of the Supreme Court of the United States, this 19th day of September, A. D. 1894.

DAVID J. BREWER,
Asst. Justice Sup. Ct.

[Endorsed:] Original. U. S. circuit court of appeals for the eighth circuit. Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, adm'x of estate of Frank B. Mase, defendant in error. Citation. Service of a copy of the within citation admitted this 4th day of October, A. D. 1894. W. W. Erwin, Walter A. Shumaker, att'ys for def't in error. Filed Oct. 4, 1894. John D. Jordan, clerk.

54 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing fifty-three pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, administratrix of estate of Frank B. Mase, defendant in error, No. 383, May term, 1894, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original writ of error and citation in said cause are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Paul, Minnesota, this fourth day of October, A. D. 1894.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,709. U. S. circuit court of appeals, eighth circuit. Term No., 182. Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of The Northern Pacific Railroad Company, plaintiff in error, *vs.* Clara Mase, administratrix of the estate of Frank B. Mase. Filed October 17, 1894.

165-363

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 182.

Office Supreme Court, U. S.
FILED
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THOMAS F. OAKES, HENRY C. PAYNE AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CLARA MASE, ADMINISTRATRIX.

BRIEF FOR PLAINTIFFS IN ERROR.

C. W. BUNN,
Of Counsel for Plaintiffs in Error.

H. M. SMYTH PRINTING COMPANY, ST. PAUL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 182.

THOMAS F. OAKES, HENRY C. PAYNE AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

CLARA MASE, ADMINISTRATRIX.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error to the Circuit Court of Appeals for the Eighth Circuit. The defendant in error recovered judgment against the Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota, for the sum of four thousand dollars with costs (Record, pp. 22-23). This judgment was affirmed in the Circuit Court of Appeals. The opinion of said court will be found at page 31 and following of the Record. The case was submitted to the Circuit Court on the pleadings and an agreed statement of facts. The facts are contained in a bill of exceptions duly settled (Record, pp. 23-24-25).

The only material facts are as follows: The deceased Frank B. Mase was an engineer on one of the passenger trains of the

Northern Pacific Railroad Company; on the 3rd of October, 1890, while engaged in performing his duties as such engineer, he was killed by an accident in the State of Montana; the cause of the accident was that his train ran onto a sidetrack and collided with certain cars and an engine, by reason of a misplaced switch; the switch was misplaced or left open by one B. L. Short, who was conductor of another train of the Company running over the same road; the accident was caused solely by the carelessness of said Short in permitting the switch to remain open (Record pp. 15-16).

The liability of the Company is alleged under a statute of the State of Montana, Sec. 697, of Fifth Division General Laws. This statute will be found on page 817 of the Compiled Statutes of Montana of 1887, and reads as follows:

"SEC. 697. That in every case the liability of the corporation to a servant or employe acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him as if such servant or employe were a passenger."

The court below based the liability solely on this statute (Record pp. 32–33). Since the writ of error issued in this court, the Receivers have been made parties.

ASSIGNMENT OF ERRORS.

The errors are duly assigned in the Record, p. 35.

The assignment which we rely upon is, that the negligence on which the recovery is based was the negligence of a co-servant of deceased and not the negligence of the corporation.

ARGUMENT.

It seems to have been the opinion of the Learned Judge who tried this case, that the deceased and conductor Short of the other train were fellow servants within the doctrine held in *Chicago, Milwaukee & St. Paul Ry. Co. vs. Ross*, 112 U. S. 377. But such was not the opinion of the Circuit Court of Appeals, which

court placed the liability solely on the statute of Montana above quoted. It is not open to discussion in this court, that the deceased and Short were fellow servants and the corporation was not liable to the defendant in error for the negligence of Short. *Northern Pacific R. R. Co. vs. Hambly*, 154 U. S. 349; *Northern Pacific R. R. Co. vs. Charless*, 162 U. S. 359; *Northern Pacific R. R. Co. vs. Petersen*, 162 U. S. 346.

The interpretation of the statute of Montana above quoted would present several interesting and difficult questions owing to its clumsy and ambiguous construction. But this court will be relieved from construing this statute, because since the decision of the Circuit Court of Appeals in this case it had been declared unconstitutional by the Supreme Court of Montana. As the decision of the Supreme Court of Montana is placed entirely on the interpretation and effect of the constitution of the State, it is binding in this court and the judgment must be reversed. *Crisswell vs. Montana Central Ry. Co.* (not yet reported) 44 Pac. Rep. p. 525.

C. W. BUNN,
Of Counsel.